

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**YIM TITH'S APPEAL OF THE ISSUANCE OF
TWO CLOSING ORDERS IN CASE 004**

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All Civil Parties in Case 004

INTRODUCTION

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), pursuant to Rules 21, 67(5) and 74(3)(a) of the Internal Rules ('Rules') hereby submits *Yim Tith's Appeal of the Issuance of Two Closing Orders in Case 004* ('Appeal of the Issuance of Two Closing Orders') requesting the Pre-Trial Chamber ('PTC') to dismiss *both* of the defective Closing Orders issued by the National Co-Investigating Judge ('NCIJ') and the International Co-Investigating Judge ('ICIJ') respectively, and additionally, to either: (i) do so with full prejudice and dismiss the case against Mr YIM Tith, or (ii) return the Case File to the Co-Investigating Judges ('CIJs') to jointly issue a single Closing Order, or (iii) assess Case File 004 itself and issuing its own Closing Order.
2. By electing to issue their own separate and conflicting Closing Orders in Case 004, both the NCIJ and the ICIJ acted in contravention of the *Constitution of the Kingdom of Cambodia* ('Cambodian Constitution'), the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* ('Establishment Law'), and the Rules. The Closing Orders submitted by the CIJs must accordingly be rejected as procedurally defective under Rule 67(2). The Defence submits that the PTC must now intervene to provide Mr YIM Tith with the definitive conclusion to the investigation to which he is entitled and to protect his fundamental fair trial rights.

PROCEDURAL HISTORY

3. The Defence incorporates by reference the procedural history included in *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*.¹
4. On 28 June 2019, the NCIJ issued his *Order Dismissing the Case against Yim Tith* ('NCIJ's Closing Order') in Khmer² and the ICIJ issued his *Closing Order* ('ICIJ's Closing Order') in English.³

¹ *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*, 26 November 2018, D378/5, paras 14 to 105.

² *Order Dismissing the Case against Yim Tith*, 28 June 2019, D381.

³ *Closing Order*, 28 June 2019, D382.

5. An English translation of the NCIJ's Closing Order was issued on 5 September 2019. In view of 'palpable inaccuracies' in the translation a revised version was notified on 16 October 2019.⁴
6. On 17 September 2019, in accordance with the extended notification period granted by the PTC,⁵ the Defence filed its notice of appeal against the Closing Orders.⁶
7. On 17 September 2019, the Defence filed *Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁷
8. On 25 September 2019, the ICP filed the *International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁸
9. On 4 October 2019, the Defence filed *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁹
10. On 30 October 2019, the PTC issued its *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, in which it granted the parties 45 days from the notification of the corrected English translation of the NCIJ's Closing Order to file their appeals and ordered the parties to file separate appeals against each Closing Order in separate documents.¹⁰

⁴ *Decision on Yim Tith's Request that the Pre-Trial Chamber Order the Urgent Provision of an Accurate English Translation of the Order Dismissing the Case against Yim Tith and Suspend the Closing Order Appeal Time Limits*, 26 September 2019, D381/12 and D382/13, para. 8. See also: *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, pp. 4 to 5.

⁵ *Decision on Yim Tith's Request for Extension of Deadline for Notice of Appeal of Closing Orders in Case 004*, 19 July 2019, D381/3 and D382/3, pp. 3 to 4.

⁶ *Yim Tith's Notice of Appeal against the Closing Orders*, notified as: *Yim Tith's Notice of Appeal against the National Co-Investigating Judge's Order Dismissing the Case*, 17 September 2019, D381/7; and *Yim Tith's Notice of Appeal against the International Co-Investigating Judge's Closing Order*, 17 September 2019, D382/9.

⁷ *Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 17 September 2019, D381/8 and D382/10.

⁸ *International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 25 September 2019, D381/13 and D382/16.

⁹ *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 4 October 2019, D381/15 and D382/18.

¹⁰ *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, pp. 4 to 5.

APPLICABLE LAW

11. The applicable law is set out in the ground of appeal below.

ADMISSIBILITY

12. The Appeal is admissible under Rule 21, Rule 67(5), and Rule 74.
13. Rule 67(5) states that the Closing Order is subject to appeal as provided in Rule 74. Rule 74(3) lists the orders and decisions of the CIJs which may be appealed by the Defence. More specifically, Rule 74(3)(a) permits the Defence to appeal orders confirming the jurisdiction of the ECCC.
14. Rule 21 sets out fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) of the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* ('UN-RGC Agreement').¹¹ While Rule 21 does not explicitly provide grounds for appeal, the PTC has held that 'it has competence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a charged person's right to appeal in light of Internal Rule 21' in order to ensure that proceedings are fair and adversarial.¹² Regarding appeals of Closing Orders specifically, the PTC has held that '[w]here appeals filed against an Indictment under Internal Rule 74 raise matters which cannot be rectified by the Trial Chamber, and not allowing the possibility to appeal at this stage would irreparably harm the fair trial rights of the accused, Internal Rule 21 may, on a case by case basis, warrant application to broaden the scope of Internal Rule 74.'¹³
15. The Closing Order must, logically, confirm or deny the jurisdiction of the ECCC over each accused. The issuance of two opposing Closing Orders is neither contemplated nor permitted by the Rules. The occurrence of two defective Closing Orders, which

¹¹ Case 004/1, *Considerations on Im Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her In Absentia*, 1 March 2016, D239/1/8, para. 17; *Decision on Yim Tith's Appeal against the Decision Denying His Request for Clarification*, 13 November 2014, D205/1/1/2, para. 7.

¹² Case 002, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, D427/2/15 para. 71. See also: Case 002, *Decision on Khieu Samphan's Appeal against the Closing Order*, 21 January 2011, D427/4/15, para. 18.

¹³ Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 48.

disagree on findings of personal jurisdiction, is a matter that fundamentally concerns whether the Court legitimately holds jurisdiction over Mr YIM Tith, and therefore this ground is appealable under Rule 74(3)(a).

16. Moreover, by issuing two Closing Orders, the CIJs have irreparably harmed Mr YIM Tith's fundamental fair trial rights, and thus violated Rule 21 as well as their obligations under international law. The CIJs:
- undermined Mr YIM Tith's presumption of innocence by failing to apply the principle of *in dubio pro reo* to their assessments of the facts;¹⁴
 - violated Mr YIM Tith's right to legal certainty;¹⁵
 - confused rather than clarified the bases of the charges, violating Mr YIM Tith's right to be informed promptly and in detail of the nature and cause of the charges against him, if any;¹⁶ and,
 - needlessly triggered complex appellate proceedings on the issue of the validity of the issuance of two separate, conflicting Closing Orders by failing to provide a single Closing Order or dismiss the proceedings, therefore adding to the already unacceptable prolongation of the proceedings against Mr YIM Tith for over 13 years and violating Mr YIM Tith's right to be tried expeditiously¹⁷

Accordingly, the Defence submits that this ground of appeal is admissible considering the fundamental guarantees demanded by Rule 21.

17. The Defence files a separate *Appeal of the ICIJ's Closing Order* to address all grounds of appeal that are legally and procedurally separable from the NCIJ's Closing Order as instructed by the PTC.¹⁸ Mindful of the concerns of the PTC for judicial and procedural efficiency, in particular the concern that appellate submissions against the separate

¹⁴ Case 002, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21 and 3014; Case 002, *Case 002/01 Judgement*, 7 August 2014, E313, para. 22; Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

¹⁵ ICCPR, Article 14(1); Establishment Law, Article 35new(a); Rule 21(1).

¹⁶ ICCPR, Article 14(3)(a); Establishment Law, Article 35new(a); Rule 21(1)(d).

¹⁷ ICCPR, Article 14(3)(c); Establishment Law, Article 35new(c).

¹⁸ *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, p. 4.

Closing Orders may require different procedural steps, the Defence respectfully submits its *Appeal of the Issuance of Two Closing Orders* containing the only appeal ground that relates to both Closing Orders.¹⁹ The error of law in the *Appeal of the Issuance of Two Closing Orders* arises equally from both Closing Orders, it supersedes the separation of the proceedings by the issuance of two Closing Orders, and it requires a conjoined remedy of the dismissal of both defective Closing Orders.

STANDARD OF REVIEW

18. The PTC has found that it may reverse a discretionary decision of the CIJs that is: (i) based on an incorrect interpretation of the governing law, i.e. an error of law, invalidating the decision; (ii) based on a patently incorrect conclusion of fact, i.e. an error of fact, occasioning a miscarriage of justice; or (iii) so unfair or unreasonable as to constitute an abuse of the CIJs' discretion and to force the conclusion that they failed to exercise their discretion judiciously.²⁰ In short, the PTC has found that 'it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.'²¹
19. In line with established international jurisprudence, the PTC has found that 'alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct.'²²

APPEAL GROUND: THE CO-INVESTIGATING JUDGES ERRED IN LAW BY ISSUING TWO CLOSING ORDERS

20. The CIJs examined the same Case File evidence and yet filed two separate and conflicting Closing Orders. In doing so, the CIJs erred in law. The Defence submits that: (i) the two Closing Orders were impermissible under ECCC law; (ii) the two opposing Closing Orders violated the principle of *in dubio pro reo* and Mr YIM Tith's right to a fair trial; and (iii) the PTC must overturn both Closing Orders and dismiss the case.

¹⁹ *Ibid.*, para. 12.

²⁰ Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 21.

²¹ *Ibid.*, paras 20 to 22. These standards apply to all discretionary decisions of the CIJs.

²² Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 113.

I. THE TWO CLOSING ORDERS ARE IMPERMISSIBLE UNDER ECCC LAW

21. The ECCC legal framework did not allow the CIJs to issue two separate and conflicting Closing Orders. The CIJs erred in doing so.
22. Article 5(4) of the UN-RGC Agreement states that '[t]he co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. As a bilateral treaty, the UN-RGC Agreement must always be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the [agreement] in their context and in the light of its object and purpose.'²³
23. Article 23^{new} of the Establishment Law dictates that investigations are 'the joint responsibility of two investigating Judges.' The text reads 'joint,' not 'parallel.' The language of this provision is clear and mandatory.
24. The issuance of a Closing Order to conclude the investigation is governed by Rule 67(1): 'The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.' Rule 67 clearly sets out that only a single Closing Order issued by both CIJs in relation to each case is permissible. Its language is mandatory and permits either and exclusively the indictment of an individual accused (whether on all or some charges) or the dismissal of the case against him or her.
25. Rule 14 envisages that the CIJs will carry out their investigations jointly and with equal authority and does not refer to the CIJs acting individually to issue a Closing Order.
26. There is no reference anywhere in the UN-RGC Agreement, Establishment Law or Rules to the possibility of either of the CIJs acting unilaterally to issue a separate Closing Order in relation to a Charged Person; such action was clearly not envisaged.
27. The only situation in which joint action by the CIJs is permissible is where they have exercised the limited power to delegate judicial actions pursuant to Rule 14(4). Such delegation, however, does not apply to actions that must be taken jointly under the Establishment Law and the Rules. In the exceptional situation where the CIJs are not

²³ Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Article 31(1); UN-RGC Agreement, Article 2(2).

required to act jointly, each CIJ may act individually *only* where they have delegated the power for such action to one of them ‘by a joint written decision.’²⁴

28. The provisions of Article 5(4) of the UN-RGC Agreement, Article 23^{new} of the Establishment Law, Rule 67, and the notable absence of any provision referring to the possibility of two Closing Orders, mean that the issuance of a Closing Order is an action that falls within the Rule 14(4) requirement: it *must* be ‘taken jointly under the ECCC Law and these IRs.’ No delegation was possible (and in any event neither of the CIJs delegated to the other the power to issue a Closing Order). The CIJs were not permitted to act individually nor to issue anything other than a joint Closing Order.
29. At the very least, given the clear illegality of two Closing Orders, the CIJs should have exercised judicial prudence and sought clarification on the issue from the PTC prior to issuing their separate orders. This would have resolved ambiguity and preserved procedural expediency.
30. Considering together Article 5(4) of the UN-RGC Agreement, Article 23^{new} of the Establishment Law, Rule 14 (including the non-applicability of the exception in Rule 14(4)), Rule 67, and the notable absence of any provision referring to the possibility of two Closing Orders, the CIJs’ actions were impermissible.

II. THE TWO OPPOSING CLOSING ORDERS VIOLATED THE PRINCIPLE OF *IN DUBIO PRO REO* AND MR YIM TITH’S RIGHT TO A FAIR TRIAL

31. The CIJ’s separate Closing Orders assessed the same factual evidence and yet came to opposite conclusions on whether Mr YIM Tith falls within the Court’s personal jurisdiction. Considering their equality as judges and shared responsibility to act jointly, the CIJs ought to have applied the principle of *in dubio pro reo* to their assessment of the facts, thus dismissing the case against Mr YIM Tith. Instead, the CIJs undermined Mr YIM Tith’s fair trial rights by issuing separate Closing Orders.
32. The CIJs are guardians of the investigation and have a ‘fundamental obligation to preserve the integrity [...] of the investigation in Case 004.’²⁵ Previously, when the

²⁴ Rule 14(4) provides: ‘Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually.’

CIJs believed that proceedings risked becoming ‘incompatible with the basic principles of a fair trial, the rule of law and judicial independence,’ they acknowledged a ‘duty under [their] oath of office to consider any and all options to ensure that the further development of the investigations before this Court is compliant with those basic principles.’²⁶ The CIJs observed: ‘It surely is common *acquis* among “civilized nations” in the meaning of Article 38(1)(d) of the Statute of the International Court of Justice by now that judges also have to ensure respect for the procedural safeguards in criminal proceedings.’²⁷

33. The principle of *in dubio pro reo* is a central component of the presumption of innocence, guaranteed under the Constitution of Cambodia,²⁸ the Cambodian Code of Criminal Procedure,²⁹ ECCC law,³⁰ and international law.³¹ It demands that doubt be interpreted in favour of the accused and applies to ambiguity arising in both factual findings on the evidence and determinations of personal responsibility.³² The Supreme Court Chamber has found that the principle ‘has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence.’³³ *In dubio pro reo* applies to all stages of proceedings, including the pre-trial stage.³⁴

²⁵ *Decision on Yim Tith’s Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 12 August 2015, D229/3, para. 26.

²⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 1.

²⁷ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 17.

²⁸ Constitution of Cambodia, Article 38. Any case of doubt shall be resolved in favour of the accused.

²⁹ The Cambodian Code of Criminal Procedure, Article 351.

³⁰ Case 002, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21 and 3014; Case 002, *Case 002/01 Judgement*, 7 August 2014, E313, para. 22; Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

³¹ ICCPR, Art 14(2); ICC Pre-Trial Chamber II, *The Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, 15 June 2009, ICC-01/05-01/08-424, para. 31.

³² Case 002, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21, 3014: the Chamber resolved factual ambiguity ‘by applying the interpretation most favouring the Accused in conformity with the principle of *in dubio pro reo*’; Case 002, *Case 002/01 Judgement*, 7 August 2014, E313, para. 22: ‘Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused’s favour’; Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

³³ Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

³⁴ *See for example*: Case 002, *Decision on Ieng Sary’s Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 310; Case 002, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, D427/2/15, para. 144. *See also*: ICC Pre-Trial Chamber II, *Prosecutor v. Bemba*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, 15 June 2009, ICC-01/05-01/08-424, para. 31: ‘Lastly, in making this determination [on the confirmation of charges] the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a

34. Mr YIM Tith's case was, and remains, the embodiment of a situation of doubt that must be resolved in favour of the accused (*in dubio pro reo*). Two equal judges, mandated to act jointly, made factual assessments of the same evidence in the Case File and came to opposite conclusions about whether Mr YIM Tith should be indicted. The NCIJ concluded that Mr YIM Tith did not fall within the Court's personal jurisdiction and dismissed the case,³⁵ whereas the ICIJ concluded, based on the same evidence, that Mr YIM Tith fell within the Court's personal jurisdiction, indicting him for crimes.³⁶ Fundamentally, the very existence of two conflicting Closing Orders raises doubts as to the findings of individual facts and the overall assessments of Mr YIM Tith's alleged personal responsibility contained in each opposing Closing Order. In their role as arbiters of fact, the CIJs were obliged to apply the axiomatic principle of *in dubio pro reo*. It was not open to the CIJs to issue conflicting Closing Orders; rather, they were judicially obliged to dismiss the case. The presumption of innocence is the cardinal rule of criminal law. It prevails in all instances of doubt. It must prevail here.
35. Moreover, the CIJs have created procedural uncertainty and further doubt. The very purpose of the Closing Order is to provide legal clarity at the conclusion of the investigation.³⁷ As the ICIJ recognised, the issuance of separate, conflicting Closing Orders creates 'procedural uncertainty',³⁸ and in essence, the ICIJ has admittedly violated Mr YIM Tith's right to legal certainty,³⁹ placing him in the unacceptable position of potentially having an unresolved indictment hanging over him perpetually, a situation recognised by the ICIJ as 'not compatible with the basic demands of the rule of law.'⁴⁰ Given the CIJs were aware that the issuance of two Closing Orders would cause procedural confusion, they ought to have sought clarification from the PTC before embarking on such a reckless and legally improper course of action.⁴¹ Rather than seek clarification, the CIJs condemned Mr YIM Tith to procedural uncertainty. All this occurred despite the already unacceptable prolongation of the proceedings against

component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage.'

³⁵ NCIJ's Closing Order, paras 666 to 687.

³⁶ ICIJ's Closing Order, paras 992 to 998.

³⁷ Rule 67.

³⁸ ICIJ's Closing Order, para. 1042.

³⁹ ICCPR, Article 14(1); Establishment Law, Article 35new(a); Rule 21(1).

⁴⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 54.

⁴¹ ICIJ's Closing Order, para. 1042.

Mr YIM Tith for over 13 years.⁴² The CIJs' illegal and imprudent actions have led to a complex web of appellate proceedings that have further precluded the conclusion of Case 004 within a reasonable time.⁴³

36. In sum, by impermissibly issuing two Closing Orders and failing to apply the principle of *in dubio pro reo*, the CIJs have fundamentally failed in their role as guardians of the investigation and have, in fact, actively violated Mr YIM Tith's fair trial rights.

III. THE PTC MUST OVERTURN BOTH CLOSING ORDERS AND DISMISS THE CASE

37. The PTC has an overarching responsibility to ensure fairness in pre-trial proceedings.⁴⁴ Unfortunately, the CIJs failed in their judicial duties to uphold the law and protect Mr YIM Tith's fair trial rights. While the CIJs could have sought earlier guidance from the PTC before issuing two Closing Orders, regrettably they did not. The responsibility now falls on the PTC to make a definitive determination to conclude this part of the proceedings and protect Mr YIM Tith's fundamental fair trial rights.
38. The ECCC's legal framework envisages and permits only a single Closing Order concluding the investigation in respect of any Charged Person that can only be issued by two CIJs acting jointly, unless one of the CIJs delegated this power, which in the present case they did not. Consequently, neither Closing Order is valid: both are null and void and thus procedurally defective under Rule 67(2). Since there is no valid indictment, Rule 77(13)(b) is inapplicable. If the PTC is unable to reach a supermajority decision, the Trial Chamber cannot be seised based on an invalid Closing Order issued by only one CIJ.⁴⁵
39. The PTC has found that it 'fulfils the role of the Cambodian Investigation Chamber in the ECCC', and, when seised by appeals against Closings Orders, 'Internal Rule 79(1) suggests that [it] has the power to issue a new or revised Closing Order that will serve

⁴² See *Appeal of the ICIJ's Closing Order*, paras 40 to 45.

⁴³ ICCPR, Article 14(3)(c); Establishment Law, Article 35^{new}(c).

⁴⁴ Case 004/2, *Decision on Ao An's Urgent Request for Redaction and Interim Measures*, 5 September 2018, D360/3, para. 6: the PTC found 'it appropriate to exercise its inherent jurisdiction as the appellate body at the pre-trial stage and in the absence of specific disposition [...] in the interests of justice.'

⁴⁵ Rule 79: 'The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.'

as a basis for trial.’⁴⁶ The Defence submits that the applicable procedures now available to the PTC are: (i) dismiss the defective Closing Orders with full prejudice;⁴⁷ (ii) dismiss the defective Closing Orders and return the Case File to the CIJs with an order to jointly issue a Closing Order in accordance with the applicable law, noting that any persisting disagreement must be resolved in favour of Mr YIM Tith;⁴⁸ *or* (iii) dismiss the defective Closing Orders, assess Case File 004 itself and issue its own Closing Order either indicting Mr YIM Tith or dismissing the case against him.⁴⁹

40. The Defence submits that it is absolutely *not* open to the PTC to dismiss only one Closing Order: the CIJs are judges of equal status, and, with the pointed exception of the presumption of innocence, the applicable law does not permit the PTC to determine that either CIJ’s action should prevail. Further, in the absence of a valid indictment, the Trial Chamber cannot be seised of Case 004 by default under Rule 77(13)(b). That the NCP appeals the substantive findings of the ICIJ’s Closing Order while the ICP appeals the substantive findings of the NCIJ’s Closing Order only compounds the absurdity of this situation.⁵⁰ In the current circumstances, the presumption of innocence and the correlative principle of *in dubio pro reo* dictate that Case 004 must be dismissed.

REMEDY

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that, in the exercise of their discretion and in the interests of justice, the Pre-Trial Chamber:

- (1) **Find** the Appeal admissible; *and*

⁴⁶ Case 001, *Decision on Appeal against Closing Order Indicting Kaing Guek Eav, alias ‘Duch’*, 5 December 2008, D99/3/42, para. 40. *See also*: Case 004/1, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

⁴⁷ Constitution of Cambodia, Article 38; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2).


⁴⁸ Rule 76(5); Constitution of Cambodia, Article 38; The Cambodian Code of Criminal Procedure, Article 351; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2). *See also*: Case 004/1, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.

⁴⁹ Rule 79(1); Constitution of Cambodia, Article 38; The Cambodian Code of Criminal Procedure, Article 351; Establishment Law, Article 35*new*; Rule 21(1)(d); ICCPR, Article 14(2). *See also*: Case 004/1, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 22.


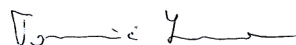
⁵⁰ *National Co-Prosecutor’s Notice of Appeal against the International Co-Investigating Judge’s Closing Order (Indictment)*, 23 August 2019, D382/4; *International Co-Prosecutor’s Notice of Appeal against the Order Dismissing the Case against Yim Tith (D381)*, 10 September 2019, D381/4.

- (2) **Dismiss** the defective Closing Orders with full prejudice and dismiss the case against Mr YIM Tith; *or*
- (3) **Dismiss** the defective Closing Orders and return the Case File to the CIJs with an order to jointly issue a Closing Order in accordance with the applicable law, noting that any persisting disagreement must be resolved in favour of Mr YIM Tith; *or*
- (4) **Dismiss** the defective Closing Orders, assess Case File 004 itself and issue its own Closing Order either indicting Mr YIM Tith or dismissing the case against him.

Respectfully submitted,



SO Mosseny

Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 2nd day of December 2019.